

Arbitration

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1 no written client complaints. It was an e-mail client
2 complaint. I'm not even sure e-mail qualifies as
3 written.

4 And, again, I don't feel it's a complaint.
5 I informed this gentleman on how to access his account
6 balance and had other communications with him.

7 Exhibit 3, it would be one thing if you
8 never responded to someone and they had asked repeatedly
9 for information about their account and you just
10 basically blew them off, which happens all the time.

11 In this instance, you can see from the
12 Exhibit 3 that I've had communications with this person
13 at one time. And, remember, this is an \$8,000 account.
14 Do you know how an \$8,000 account rates in the brokerage
15 business? It's unprofitable business. You're not going
16 to make any money on this account. This account
17 basically would be ignored by a large percentage of
18 brokers.

19 He asked me at one time how he could get
20 his account on Quicken, which I am not even familiar
21 with, and I responded to his e-mail. I had had that and
22 other communications with him. I did not consider this
23 a client complaint, and I did not think of forwarding an
24 item like this when the firm was being deluged with real
25 complaints involving client losses.



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1 In a regional sales meeting, financial
2 advisers were asked to step up production by Mr. Leroy
3 Hamel in order to mitigate \$700 million in judgments
4 against the firm.

5 Wells Fargo's own guidelines specify that
6 financial advisers should strive to have less than three
7 complaints annually. That's Exhibit 11. Even if you
8 consider this a bona fide complaint, I've had one in
9 over three years.

10 There were no other instances of trade
11 errors or client complaints before this time and
12 financial advisers are expected to make judgments every
13 day regarding commission levels and the most appropriate
14 way to handle client concerns.

15 I was terminated without counsel, never
16 given the option of resignation, which when interviewing
17 with brokerage firm managers, they said, "Ken, if they
18 felt this way about you, why didn't they just let you
19 resign?" I was never given that option.

20 And these infractions were never specified
21 to be reasons for termination in any Wells Fargo
22 employment manual. My record of no client complaints or
23 other violations was never considered.

24 If we interviewed 20 brokerage managers and
25 described the situation, I am confident that all of them



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1 would say they would not consider these reasons for
2 termination. Financial advisers who accumulated
3 multiple infractions of policy and client complaints
4 were not terminated and are still working at Wells
5 Fargo.

6 My termination is a clear case of age and
7 health consideration discrimination leading to wrongful
8 termination and is covered by wrongful discharge
9 provisions which are an exception to at-will employment
10 provisions. Again, that's one of my major points.

11 The wrongful termination is covered by
12 wrongful discharge provisions which are an exception to
13 at-will employment provisions.

14 Mistruths also baited me into maximizing
15 commissions generated in the last few days of the
16 September production month via an earlier e-mail which
17 warned me that production requirements were enforceable
18 on a monthly basis after I reported that I may come in
19 just under the required production amount for September,
20 but had business lined up for October. This is another
21 example of an intentional infliction of emotional
22 distress.

23 Adjustments for licensed banker referred
24 business were also made at the end of the month so
25 financial advisers could not accurately predict their



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1 exact closing production amounts.

2 Additionally, California labor law states
3 that there is an implied contract even for at-will
4 employees regarding just cause for termination. The
5 situation also qualifies as an implied contract
6 exception because of the promissory note conditions of
7 amortization over a five-year period, the requirement
8 that I complete five years of employment in order not to
9 be subject to penalty.

10 The promissory note also qualifies as
11 common law contract in Section 35.5 of the California
12 Division of Labor Standards. Enforcement also states
13 that the implied covenant of good-faith and fair dealing
14 imposes upon the employer the duty not to do anything
15 which would deprive the employee the benefit of the
16 contract. That is the promissory note.

17 Section 35.4, the enforcement policies of
18 the interpretation manual states that the promise of the
19 bonus becomes a unilateral contract in a case called
20 Lucien versus All State Trucking; and goes on to state
21 that a specific bonus plan normally becomes binding as a
22 unilateral contract when the employee begins performance
23 in the sense that it cannot be revoked by the employer.

24 And what I am seeing there is that my
25 status as an at-will employee stopped at the time Wells



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1 Fargo asked me to sign the promissory note according to
2 California labor law and contract law. And that, you'll
3 be happy to know, is the last of my comments on that
4 topic.

5 CHAIRMAN: Very good. You know, let's --
6 do you have other topics that you plan to present?

7 MR. SHAFFER: Yes, a number of them.

8 CHAIRMAN: And they're included in these 25
9 or so pages that's received in the binder of documents;
10 is that --

11 MR. SHAFFER: Exactly. And the text of my
12 comments is only the first six pages or so.

13 CHAIRMAN: I'll ask Mr. Kane what he wants
14 to do. Do you want to counter or examine Mr. Shaffer as
15 we go through the topics topic-by-topic or do you want
16 to --

17 MR. KANE: I think he should finish it. I
18 think he should do it as we were testifying. I really
19 do object to us just reading this. I think we should
20 get to the documents. This would all be closing
21 arguments after he presented substantive evidence. This
22 is not substantive evidence that he's --

23 CHAIRMAN: Mr. Shaffer is still under oath.
24 When he talks about the California law says this and
25 that, I'm inclined to agree with you. When he talks



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1 about the relationship with this 15-year client, that
2 obviously --

3 MR. KANE: No, I don't have a problem with
4 that. But what's coming is all legal, promissory
5 estoppel, fiduciary duty, infliction of emotional
6 distress. All of that is a legal argument.

7 CHAIRMAN: I agree with that. Can you tell
8 us what happened to you, which things were done which
9 would later be the basis for the argument that such and
10 such is promissory estoppel? Does that make any sense
11 to you?

12 MR. SHAFFER: We can refer -- you know,
13 Mr. Kane's comments that this was all just legal talk or
14 something, I referenced exhibits here which we can
15 review one by one if you want to. But some of the items
16 have already been brought up. And I thought that you
17 would prefer me not to address the individual exhibit.
18 But I certainly can do that.

19 ARBITRATOR: It helps if you mention an
20 exhibit like you just did, to go back and say what page
21 it is. Then we become distracted from what you're
22 saying.

23 CHAIRMAN: So with regard to the libel or
24 slander on Form U5, what is that all about? Not the
25 law, but what are you talking about?



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1 MR. SHAFFER: Well, the entries are
2 deceiving and unclear because they create the impression
3 that, one, the client who was overcharged also
4 complained, and that this was other than a small
5 accidental overcharge. I mean, there's no --

6 CHAIRMAN: So your U5 is based on what you
7 regard were circumstances of an accident. And you've
8 already explained your relationship with the particular
9 clients who were involved.

10 MR. SHAFFER: Which I know really doesn't
11 matter. That's just my pride in my relationship with
12 these people, that I wouldn't intentionally overcharge
13 them out of \$300 or jip them out of \$300. That's
14 preposterous.

15 And I have an exhibit here which I can
16 quickly find which I didn't notate there from Waddell
17 and Reed, which is a firm I interviewed with after this.
18 Here it is. If you go back in the back of my materials,
19 you'll find a page -- you'll find some information from
20 E-Trade at page 7. At the bottom, it says 10/5/2010 at
21 the very bottom of the page.

22 ARBITRATOR: How far back are you? How
23 many pages back?

24 MR. SHAFFER: Let's say two-thirds of the
25 way back. If you look at the bottom of the pages,



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1 there's a date that says 10/5/2010.

2 ARBITRATOR: I've got it. It says "Mass
3 Mutual" on top?

4 MR. SHAFFER: Yes.

5 CHAIRMAN: What are you pointing out here?

6 MR. SHAFFER: I'm pointing out this e-mail
7 from Mr. Joanne Carlefoti (phonetic) who is a manager of
8 Reed and Waddell in Sacramento, which is a brokerage
9 firm, as you're probably aware.

10 And in it, he says, "Sorry for getting back
11 to you so late. I was out of the office for study.
12 Yes, we are denying your application due to
13 circumstances." And this is cut off the way I tried to
14 print the e-mail, but "from circumstances related to
15 your U5 regarding termination from Wells Fargo."

16 I tried to contact the other employers that
17 had turned me down, and it's amazing, they either
18 wouldn't return my call or they wouldn't verify that
19 this was the reason for my decline.

20 And they all told me that in-person or on
21 the phone. But this was an e-mail that I happened to
22 get from that gentleman that says that my decline was
23 based only on entries from my Wells Fargo U5. And
24 that's the end of it.

25 And, again, if you look at California Labor



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1 Code Section 150 regarding black-listing, you'll see it
2 there. And I believe that I enclosed that in the
3 materials on the labor codes.

4 CHAIRMAN: Is the labor code included in
5 your paper here?

6 MR. SHAFFER: I believe it is. I can find
7 it if you'd like me to.

8 ARBITRATOR: Please find it. It's on one
9 of the pages of the labor code that I printed and it has
10 26-1 at the bottom in June of 2002. And excuse me,
11 that's about -- that's only one-third -- it's about
12 one-third of the way into it. It's in the -- all the
13 labor code violations that I have listed here.

14 MR. KANE: I've seen a June 2002 --

15 MR. SHAFFER: That's it. And it says
16 "21.1" on the other side. Again, this is in the section
17 that has the addition of California labor standards in
18 the section division of labor standards enforcement
19 policies and interpretations.

20 CHAIRMAN: And how does one know what
21 section it is?

22 MR. SHAFFER: Thumb through there. It's
23 also one that's (inaudible). Anyway, you know, if -- I
24 don't think it's necessary that you necessarily find it.

25 ARBITRATOR: Yes, it is. When you



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1 reference something, we really have to look at it.

2 MR. SHAFFER: Do you want me to help?

3 ARBITRATOR: Yes, please.

4 MR. SHAFFER: You're right. That one says
5 2002, too.

6 MR. KANE: I'll make sure I'm on the right
7 page.

8 ARBITRATOR: Because it starts with
9 "accommodation does not include" --

10 MR. KANE: I'm on the right page, then.

11 MR. SHAFFER: It's close to the end of that
12 section. So if you go to the end of that section.

13 CHAIRMAN: What's the section, I don't see
14 it.

15 ARBITRATOR: It's the section --

16 CHAIRMAN: I'll just read that.

17 MR. SHAFFER: It's right there. It says
18 "Labor Code S1050, preventing employment by means of
19 misrepresentation. Its illegal for an employer or any
20 agent or officer thereof to prevent the reemployment of
21 an employee who has left the employer's service either
22 by discharge or voluntary quit an employee who was
23 damaged by employer's untruthful statements or recovered
24 damages."

25 CHAIRMAN: You've got it. That's the one.



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1 And I guess the next section that you
2 wanted to talk about is disability benefits; right.

3 MR. SHAFFER: Sure.

4 CHAIRMAN: Unless you have more to testify
5 about with regard to the U5.

6 MR. SHAFFER: No. That's it.

7 So disability benefits?

8 CHAIRMAN: Yeah. First of all, were these
9 benefits provided by Wells Fargo or were they provided
10 by an outside insurance carrier?

11 MR. SHAFFER: Provided by Metropolitan
12 Insurance. Not provided by me, but were provided to me
13 by Metropolitan Insurance.

14 CHAIRMAN: And so the question is: What
15 did Wells Fargo do to you to prevent you from getting
16 disability?

17 MR. SHAFFER: That's true. And my manager
18 at the time, not my terminating manager, who has left
19 Wells Fargo after a little less than 24 months, but the
20 manager before that, Ms. Barbara Brandell, was copied on
21 the notices of decline of my disability coverage. I
22 believe that made her feel as though I was faking this
23 illness or didn't really need to take the time off.

24 So I have doctor's records here that
25 recommend that I take the time off. I'd like to tell



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1 you a little bit more about the situation because I
2 believe it impacted my employment status at Wells Fargo.

3 MR. KANE: My only comment is Wells Fargo
4 didn't have anything to do, as he and -- with denying
5 disability coverage. That was a third-party insurance
6 carrier. So unless it's probative of anything that
7 Wells Fargo did to cause Metropolitan to deny it, it
8 doesn't have anything to do with Wells Fargo.

9 CHAIRMAN: Excepting that it may have
10 something to do with his continued employment with Wells
11 Fargo and we will allow him to continue with that.

12 MR. SHAFFER: And I have found those
13 exhibits. I don't think they will be as hard to find.
14 Even if Wells Fargo is providing the disability
15 coverage, if it's highlighted in my Wells Fargo benefits
16 information, I think they need to take some
17 responsibility for providing those benefits. I mean,
18 because one of my exhibits is that I did have short-term
19 disability coverage and long-term disability. But let
20 me go on. I'll save that for later.

21 After suffering for a long time with
22 coughing and a choking condition which my physician
23 describes as laryngeal spasm, which I can tell you more
24 about if you'd like, I began having episodes of sleep
25 apnea, a waking at night unable to breathe.



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1 At that point, I decided to take my
2 doctor's earlier recommendation and take time off for
3 voice rest, as she put it. I related the situation to
4 an employee benefits specialist at Wells Fargo and was
5 told that this was a qualifying short-term disability as
6 a result of my doctor's recommendation.

7 And that person e-mailed me a review of my
8 disability benefits, which is Exhibit 5 on the exhibits,
9 if you'd like to look at them. So, again, I'm assuming
10 that I have these disability benefits. And I took the
11 time off.

12 And later, I was informed by Metropolitan
13 Insurance that they would not be paying my disability
14 benefits which were I thought generous and substantial,
15 because they could not get the needed information from
16 Kaiser, my physician, my -- what is it, primary care
17 provider, and the records they did get did not support
18 my leave.

19 So Exhibit 5 outlines my disability
20 benefits under the Wells Fargo plan. It doesn't talk
21 about who is providing it. In fact, it says right here
22 on Exhibit A under the exhibits section, which is in
23 about the first -- after the first third of it, I'm
24 sorry these aren't labeled better, but this whole
25 presentation -- anyway, it's under Section 5, it says,



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1 "Wells Fargo provides short-term disability protection
2 at no cost to you if you cannot work for more than seven
3 consecutive calendar days."

4 It doesn't say Metropolitan provides these
5 benefits or that Metropolitan provides them through
6 Wells Fargo. It says that Wells Fargo provides these
7 benefits.

8 And if you look at the very next page,
9 you'll see my Kaiser's physician statement that says
10 that I will be unable to attend work from September 22nd
11 to November 1st.

12 CHAIRMAN: Okay. Hold off just a second
13 while we -- and this previous page with the 5 at the top
14 is what, it's a document that you were provided by Wells
15 Fargo?

16 MR. SHAFFER: Right. When I told them that
17 my doctor suggested I take time off for this. And,
18 again, this was more of an annoyance and inconvenience
19 before I started with the episodes of sleep apnea. And
20 when that happened, I don't know if you've ever
21 experienced sleep apnea or not, but I decided that I
22 needed to do what was important to do.

23 I related that situation, and then I was
24 given information on the first part of Exhibit 5 which
25 shows my disability benefits. My doctor provided this



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1 visit verification form which says I'm unable to attend
2 work from November 22nd to December 1st.

3 And Metropolitan says that the records they
4 received did not support my leave.

5 CHAIRMAN: Again, we're interested in
6 knowing what Wells Fargo had to do with the denial of
7 your disability benefits or whether the denial of
8 disability benefits had some influence on your
9 employment with Wells Fargo. Are either one of those --

10 MR. SHAFFER: Well, I think Wells Fargo is
11 responsible for providing disability benefits. Again,
12 on Exhibit 5, it says Wells Fargo is providing these
13 benefits. It doesn't say Metropolitan.

14 And two, I think that when the records came
15 back from metropolitan, which is also attached here, and
16 said that I was not found to be -- in fact, it's at the
17 very, very back at the booklet, there's a letter from
18 Metropolitan. And it says they are denying my claim for
19 short-term disability benefits.

20 And all of this was copied to my manager at
21 the present time, which I think made her believe that I
22 was trying to do this as some kind of scam or take this
23 time off. But they --

24 CHAIRMAN: And what evidence is there of
25 that?



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1 MR. SHAFFER: Well, I'll be getting to that
2 in other types of situations. I don't think you want me
3 to delve into that right now.

4 CHAIRMAN: No. What is the evidence that
5 any person at Wells Fargo in a senior position to you
6 thought that you were faking this to take time off?

7 MR. SHAFFER: General treatment of me, the
8 kinds of statements she made, and --

9 CHAIRMAN: Who made what statements?

10 MR. SHAFFER: Ms. Brandell would never ask
11 me anything about my health. It was like it was a
12 nonissue. And she did say one time, "Oh, well, you look
13 better now." But it was like with a note of there's no
14 considerations for any kind of health concerns.

15 And the thing is, I was also placed on
16 revenue quotas that I thought were unreasonable, and I
17 think that very possibly, this situation with the
18 withholding of the disability benefits affected that
19 situation.

20 My physician, Dr. Orwanas, indicated this
21 was a serious health condition on that Exhibit 5 and
22 recommended absence plus treatment. Metropolitan
23 effectively overruled my attending physician without
24 providing their own examination or interview. I'm still
25 bothered by respiratory issues. This is why I wanted to



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1 enclose Exhibit 5.

2 I'm still bothered by respiratory issues.
3 If this condition is deemed to have effectively ended my
4 brokerage career, my long-term disability coverage for
5 \$10,000 a month, \$120,000 a year until age 65, and would
6 have had a value of \$1.5 million, just so you know what
7 the situation is. And that's the last part of my
8 disability (inaudible).

9 CHAIRMAN: Do you have any writing or can
10 you quote any statement or testimony that any person at
11 Wells Fargo thought you were faking the disability?

12 MR. SHAFFER: No. I don't have anything
13 like that in writing. I do have -- here's one of my
14 exhibits in the back. Near the very back is an e-mail
15 from Ms. Brandell on December 31st, which was the two
16 months I took off work, October and November of 2008.
17 So I'm back in December and I get an e-mail.

18 And, again, go to the very back of the
19 little booklet and then go in probably 15 or 20 pages
20 and at the bottom, it says W00007. And it's an e-mail
21 from Barbara Brandell. Again -- yeah, I could have done
22 a little job labeling them. I've never been in this
23 kind of situation in 30 years. So just go from the
24 back, go in about ten pages or so.

25 ARBITRATOR: We have it now.



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1 MR. SHAFFER: Do you see Ms. Brandell says,
2 "Ken, per our conversation on December 17th", that was
3 two-and-a-half weeks after I came back from sick leave,
4 "the verbal warning performance and management process
5 is resuming on January 2nd, 2009. You must achieve
6 75 percent of your sales goal by January 31st."

7 And the reason that it was 75 percent, it
8 was not any kind of an exception for me, it was a
9 firm-wide exclusion or diminution of the sales goal
10 because the markets had crashed during that period.

11 And another reason I thought Ms. Brandell
12 possibly held it against me for being out is her
13 comments that, "Gee, I can't believe you were out of the
14 office during that period", and statements to that
15 effect. Anyway, so achieve 75 percent of the sales goal
16 January 31st.

17 "Given that your new annual goal is
18 \$310,000, you must produce \$19,375 a month in January.
19 We will continually review and assess your progress. I
20 sent you an e-mail on January 7th." So that's not a big
21 deal. And that's at end of my disability.

22 CHAIRMAN: What is this handwriting on
23 this?

24 ARBITRATOR: February 4th.

25 MR. SHAFFER: 2/4/09, must meet 80 percent,



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1 February is 26,666. See, I got this from the
2 information that the law firm sent me. I got a box
3 again on the 23rd that had probably ten pounds of paper.
4 And this is one of the things I found. So this is Ms.
5 Brandell's writing here.

6 CHAIRMAN: That was the next question:
7 Whose writing is it?

8 MR. SHAFFER: It's not mine. I would
9 assume it's Ms. Brandell's.

10 CHAIRMAN: Do you know whose it is?

11 MR. SHAFFER: No, I don't know for sure.

12 CHAIRMAN: All right. Then you have a
13 category here of wrongful withholding -- or rather
14 withholding of commissions.

15 MR. SHAFFER: Withholding of commissions
16 was executed as part of the unfair licensed banker
17 program, which credited only 50 percent of revenue from
18 an account introduced by a licensed banker for the first
19 year. The withheld compensation was not counted towards
20 goal achievement or compensation and not evenly applied
21 in all branches. Some branches had licensed bankers,
22 some branches had no licensed bankers.

23 But, again, if you had a branch with
24 licensed bankers, then any accounts referred by them,
25 you received 50 percent credit for any business you did.



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1 So if you met with some new people and set up a plan and
2 generated \$5,000 in commissions, they would take back
3 \$2,500 of that, 50 percent. And that I pointed out in
4 quarterly meetings where I was usually derided for not
5 generating enough commissions, I said, "Hey, what about
6 the 50 percent from the licensed banker referred
7 accounts?"

8 They said, "Well, hey, you know, that part
9 of the game right here in the policy is you get
10 50 percent of any licensed banker referred account."
11 The thing is, this money just went into thin air. It
12 wasn't considered as part of goal achievement. So I
13 could have generated much more than my commission amount
14 per month; but, again, only 50 percent of the licensed
15 banker commissions were counted.

16 And it wasn't evenly applied at all
17 branches. The branch at which I did my most business
18 and the branch that I was able to generate the larger
19 amount of revenue in 2008, my Micron branch, as they
20 called it, had no licensed bankers in 2008.

21 And at the start of 2009, even though it
22 was a struggling branch in a disadvantaged economic
23 area, it was assigned two licensed bankers. And, again,
24 everyone at Wells Fargo, everyone of the branches,
25 everyone everywhere is constantly pressured to generate



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1 results in sales and commissions.

2 And so they -- when you put the licensed
3 bankers in the branch, the licensed bankers immediately
4 go to all the other employees in the branch and ask them
5 to filter their referrals to the financial adviser, to
6 Ken or whoever it may be, "Please filter those through
7 me because then I get a credit."

8 And what happens effectively is you put two
9 licensed bankers in the branch, and then all the
10 referrals are coming through the licensed bankers.

11 I think this was a very clever plan that
12 Wells Fargo had so that the financial advisers would in
13 effect help pay the salary of the licensed bankers,
14 which is -- and licensed bankers had a security license,
15 so they could refer qualified prospects. But they also
16 had banking goals. They needed to open bank accounts
17 and do loans and all kinds of things. So this is only
18 one thing that they did.

19 And, again, the 50 percent exclusion was
20 not counted towards anything, the goal of achievement or
21 compensation and my goals which subjected me to
22 termination, if not met, were raised during this period.
23 So they put the two licensed bankers in the branch and
24 they also raised my goals.

25 The other branch I had was a brand-new



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1 branch and generated practically nothing for me. The
2 rationale for the licensed banker program was that the
3 licensed banker would bring the financial advisers more
4 qualified prospects and that the expense of the licensed
5 banker was covered by the bank.

6 Section 34.3 of the Division of Labor
7 Enforcement Manual, that section in the middle there
8 states, "If the element of which the deduction of gross
9 sales is based on a cost which is attributable to the
10 employer's cost of doing business, the element may not
11 be used."

12 I understand that the policy has been
13 changed now, which I think is an admission of violation.
14 So, again, California labor standards says you can't
15 deduct the commission if you're doing it as a result of
16 your cost of doing business.

17 And the argument for having the licensed
18 bankers in the branch were, "Oh, well, these guys are
19 going to generate more referrals for you and we're
20 paying them a salary."

21 In effect, if you think about it, the
22 licensed bankers didn't get paid commissions, they got a
23 quarterly bonus. So the financial adviser was basically
24 paying the licensed bankers a quarterly bonus through
25 this procedure because they were backing out the



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1 commission.

2 And then to subject me to termination for
3 not meeting \$20,666, we're going to talk about that a
4 little bit, one time I was threatened with termination
5 by missing my sales goal by \$500. Not only is it crazy
6 and it's not general policy in the brokerage business,
7 but what it is is that money that was withheld as part
8 of this licensed banker thing.

9 And you can see why I'm using these notes
10 because I do get a little emotional about this. I'm
11 30 years in the business with no complaints. I've got a
12 book of clients. You think that I would have the
13 ability to continue making a living. And now that's
14 been removed from me.

15 I'll talk about it a little more. I
16 applied for some other positions realizing, "Hey, I've
17 been out of the brokerage business now. I've been away
18 from my clients now. I heard from a recruiter, after
19 I've been out of the business for six months, "Ken, no
20 one is going to hire you now after you've been out of
21 the business for six months at a bank where there's a
22 built-in clientele."

23 And as far as my moving my existing
24 clientele that I had when I went to Wells Fargo and
25 brought to Wells Fargo, the managers I've talked to



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1 said, "Ken, you'll spend more than a month -- you're not
2 going to go back and get very many of these clients."

3 I've talked to a number of those clients. A lot of them
4 have found other sources for the guidance and advice
5 that they relied on me on. It's been very upsetting for
6 them, but they had to find someone else.

7 I've been out of the business a year now.
8 And that's, again, why I have the written notes, because
9 I will stop rambling at this point and go on to the next
10 point if you'd like me to.

11 CHAIRMAN: Go ahead. And, again, we want
12 your testimony and not necessarily -- and not your
13 argument. You can do that in your closing argument.

14 MR. SHAFFER: Okay. So on the subject of
15 promissory estoppel, in addition to verbal comments on
16 my assignment of a new branch after three years of
17 requests -- that's my Exhibit 6. If you'll go back to
18 my exhibits, Exhibit 6 -- and the exhibits are kind of
19 in the middle. And so if you pull it apart almost in
20 the middle, almost towards the front, you'll see --

21 ARBITRATOR: What's on the bottom of the
22 page?

23 MR. SHAFFER: There's nothing on the bottom
24 of the page. Oh, there's a 1. And this is from my
25 third sales manager while I was there, Jan Krug, who is



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1 no longer with the firm. And I was wondering if maybe
2 Mary would like to comment on why that situation is the
3 fact, because I've heard some reasons for that.

4 And in this e-mail dated September 23rd,
5 approximately a week before my termination, she says,
6 "Hi, Ken and Chris." Ken is to me and Chris is to
7 another broker who actually has been terminated, Chris
8 Obenjane. "Just received word that Jim Uren, who is
9 slated to assume coverage of the Micron store, will
10 delay his return from medical LOA per his doctor's
11 orders until November 1st, 2009."

12 Now, Jim Uren, after returning from a hip
13 surgery, has been terminated from the Wells Fargo
14 program. So the two other people referenced in this
15 e-mail have been terminated. And I can go more into Jim
16 Uren's situation if you'd like. We're not here to
17 address this, but it's truly sad.

18 "Because of that", she says, "we will delay
19 the store coverage changes until he returns. I do
20 apologize for the confusion, so it's business as usual
21 until the end of October."

22 And, again, it's not just business as usual
23 until the end of October because at the -- I'm supposed
24 to assume coverage of a new branch, which I had been
25 complaining in quarterly reviews regularly that the



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1 branches I had would not support the production
2 requirements that they were giving me. So I asked to be
3 assigned to another branch.

4 And, finally, Ms. Krug acquiesced and
5 assigned me to a new branch. And here's an e-mail that
6 says "it's business as usual until I start the new
7 branch at the end of October." And that fits the
8 definition of promissory estoppel.

9 Labor Code S90 Section 30.16 says, "The
10 promise which the promisor should reasonably expect to
11 induce action or forbearance on the part of the
12 promisee", me, "and which does induce action or
13 forbearance is binding", which it did, because I assumed
14 I was starting a new branch.

15 If I knew I was going to be terminated, I
16 would have made copies of my broker files and got a copy
17 of my T12 and so on. And certainly I would have
18 resigned if I knew they were going to put these comments
19 on my U5 which prohibits me from employment.

20 But it does induce action or forbearance is
21 binding if the injustice can only be avoided by
22 enforcement of the promise. And then, again, everyone
23 in this e-mail is not at Wells Fargo. I'm not sure what
24 Jan's situation was.

25 And right after that Exhibit Number 6,



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1 you'll notice a little thing there, it's in all this
2 information or this description of this situation at
3 Wells Fargo, you can -- you get the feeling that I have
4 a bad attitude; right? I think we can all agree on
5 that.

6 And I would just like to point out that my
7 bad attitude was caused by the lack of follow-through on
8 promises made to me, the demeaning approach that Wells
9 Fargo takes to employee management, constant pressure
10 and threats of termination for missing sales goals.

11 In spite of my problems with Ms. Brandell
12 and Ms. Krug, no persons I worked with in the branches
13 could say I was anything but friendly and supportive. I
14 befriended many of my banker partners and met several on
15 social occasions.

16 Many employees of theirs, including all
17 three of the licensed bankers I have worked with, have
18 complained to me about the pressure to maximize sales
19 and the demeaning nature of their interaction with their
20 managers. Several asked me if I could identify an
21 opportunity for employment away from Wells Fargo.

22 MR. KANE: I haven't been objecting, but I
23 have to object to this. This has nothing to do with his
24 complaint. It relates to unnamed other individuals. It
25 just doesn't relate to this controversy. I haven't



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1 objected so he could tell his story, but this is going
2 so far afield that I must object.

3 MR. SHAFFER: The only reason I brought it
4 up is because I think it was part of my reason for my
5 termination.

6 CHAIRMAN: Your bad attitude?

7 MR. SHAFFER: Their perception of my bad
8 attitude.

9 CHAIRMAN: I think your point has been made
10 and I'm going to sustain the objection.

11 MR. SHAFFER: One of the other things I
12 would like to suggest is that Wells Fargo and Kane and
13 Fischer and Jan Krug and Mary Mortensen are guilty of
14 intentional and negligent infliction of emotional
15 distress.

16 MR. KANE: First of all, let me object to
17 that. Nowhere in any of his claims has he raised this
18 issue as it relates to Ms. Mortensen individually or Ms.
19 Krug individually or my law firm individually. Let me
20 have a moment to make sure I'm going correct.

21 Nor is it included anywhere in his original
22 counterclaim or answer. I'm looking at it now just to
23 make sure I was correct on that. I'm looking at the
24 counterclaim.

25 CHAIRMAN: Which is in the form of several



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1 letters.

2 MR. KANE: There are several letters. The
3 one I have, there's an answer and then there's a
4 counterclaim. This is the answer and this is the
5 counterclaim. It's the same for both the answer and the
6 counterclaim.

7 I'll be happy to hand it to -- he filled
8 out the form on the counterclaim. I can hand it to the
9 panel. These are the areas that are referenced in
10 counterclaim: Wrongful termination, commission
11 withholding, promissory note as a bonus, libel, slander.
12 In his answer, he did have the promissory estoppel.

13 CHAIRMAN: Is this his letter which has a
14 receipt date of April 14th?

15 MR. KANE: That's the answer. The
16 counterclaim has -- it was filed after that. And it has
17 a date of -- his signature is dated April 27th of 2010.
18 It is followed by a "to whom it may concern" letter that
19 starts the following -- is a full description of the
20 areas of dispute specified in this claim.

21 CHAIRMAN: There's something January 11,
22 2010, to Mr. Raymer. Is that --

23 MR. KANE: No, I don't know what that is.
24 We responded to the counterclaim on May 24th of 2010.
25 What I'm referring to is this, Chairman. This is the



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1 FINRA counterclaim. The first page is the check where
2 he filed his counterclaim, then it's followed by the
3 form. And then at the end is -- the form is April 27th
4 of 2010. Then it's followed by the "to whom it may
5 concern".

6 CHAIRMAN: Curiously, we did not receive
7 this.

8 ARBITRATOR: No, we didn't receive this.

9 MR. KANE: And it starts with the "to whom
10 it may concern" after that.

11 CHAIRMAN: No, we haven't seen this.

12 ARBITRATOR: No, we haven't.

13 MR. KANE: I'm sure what you saw is the
14 answer, his original answer that has that receipt date.
15 But subsequent to the answer, the question was was this
16 answer a counterclaim, had he filed the counterclaim
17 filing fee. Subsequently, Mr. Shaffer did file the
18 counterclaim filing fee and did file this document as
19 his counterclaim.

20 CHAIRMAN: That's why I saw your response
21 to Shaffer's counterclaim with some surprise.

22 ARBITRATOR: Yeah, I was trying to figure
23 that one out, too. Apparently, they were having some
24 shifts in personnel at FINRA and the case got shifted
25 from one --



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1 CHAIRMAN: We don't know what happened.
2 But in any event, we hadn't seen this. So your point
3 that Mr. Shaffer has not raised in his counterclaim or
4 any papers connected to or attached there the claim of
5 emotional distress.

6 MR. KANE: That's correct. We'll get to
7 the next one. Under the rules, if he's going to do
8 that, he would have had to seek by motion leave to amend
9 his counterclaim. There's a FINRA rule on that. Let me
10 get it for you. It's Rule 13309(b). "After a panel has
11 been appointed, a party may only amend a pleading if the
12 panel grants a motion to amend in accordance with the
13 rules."

14 And, of course, we have ten days to respond
15 to any motion to amend the pleadings. My point in
16 raising this now is this matter has been pending for a
17 long time. I don't need to be surprised at the hearing
18 with these allegations that have never been raised and
19 are being raised for the first time.

20 Same thing with the breach of fiduciary
21 responsibility. That's never been raised before in any
22 of his pleadings. I object to that. It's not fair to
23 me, but more importantly, it's not fair to my client to
24 have these things raised the day we start a hearing.

25 CHAIRMAN: I understand.



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1 MR. SHAFFER: And I'm sorry if I didn't
2 follow the procedure. I came upon these terms and
3 definitions when I was researching this situation. And,
4 you know, I think this is general employment law stuff.
5 It's not really anything that needs to be prereleased,
6 is it?

7 MR. KANE: With all due respect to
8 Mr. Shaffer, this is not general employment law stuff.
9 This is important stuff that I've never seen before and
10 shouldn't be surprised with.

11 CHAIRMAN: Okay. Give me or give us just a
12 few minutes.

13 ARBITRATOR: Do you want to take a break
14 and we can talk?

15 MR. KANE: We can leave the room if you'd
16 like.

17 ARBITRATOR: Off the record, please.

18 (A discussion was held off the record.)

19 CHAIRMAN: Okay. Mr. Kane has objected to
20 any further testimony or commentary with regard to a
21 claim of intentional and negligent infliction of
22 emotional distress. And he's also objected to any
23 further testimony on the quote, "breach of fiduciary
24 responsibility", closed quote.

25 The panel will sustain the rulings, sustain



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1 the objections. Did you want to discuss that further?
2 Let's go outside. Off the record.

3 (A discussion was held off the record.)

4 CHAIRMAN: The panel has had a discussion
5 with regard to the two objections that Mr. Kane has
6 made, one with regard to the panel receiving any further
7 testimony on the crime of intentional negligent
8 infliction of emotional distress; and, secondly, the
9 breach of fiduciary responsibility.

10 Mr. Shaffer, the panel is going to sustain
11 the objections on the grounds that neither of these were
12 mentioned in the counterclaim. And, furthermore, the
13 gravitas of these would require Wells Fargo to present
14 testimony to defend themselves with these claims, and
15 not having notice of them, has not been able to do so.

16 MR. SHAFFER: I understand that, Mr. Reese.

17 CHAIRMAN: Thank you.

18 MR. SHAFFER: The reason I bring those up
19 is that you had mentioned that these proceedings could
20 initiate a referral regarding violation of policies.
21 And I just wanted to bring these up to clear the air.

22 CHAIRMAN: I understand. But we would have
23 had to have evidence and had a full hearing, which we
24 have not.

25 MR. SHAFFER: If we can continue, I have



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1 more information on my claim of wrongful termination.

2 CHAIRMAN: Go ahead.

3 MR. SHAFFER: Again, I do understand the
4 situation -- remember, there was no problem that we ever
5 discussed with client complaints or breaches of policy,
6 anything like that. It was always about commission
7 levels, sales performance warnings.

8 And I was subject to verbal production
9 warnings, verbal, not written. Verbal production
10 warnings means you have to meet that level of production
11 without concern of where you get it from. Just come up
12 with this production number or you could be put on
13 written warning.

14 Written warning means if you don't obtain
15 that given production number, then you can be
16 terminated. I was subject to verbal production warnings
17 prior to my disability leave in October and November of
18 2008. A rational person would assume that this was
19 because I was not selling commission generating
20 products, right, if the broker is not generating the
21 proper amount of commissions because he or she is lazy
22 and they're not selling the product?

23 Well, I would like to draw your attention
24 to Exhibit Number 4 within the section there for
25 exhibits, and let me give you a minute to take a look at



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1 that. It's labeled Number 4 under the exhibit.

2 ARBITRATOR: Is it Bates stamped on the
3 bottom W00042?

4 MR. SHAFFER: No. 00042 is the page before
5 that. Turn to the next page. That is something I would
6 like to review, but not now. The exhibit I'd like to
7 have you take a look at is right after. So everyone
8 found that? It's a long listing of names.

9 MR. KANE: It's after 42?

10 MR. SHAFFER: Yeah.

11 MR. KANE: I've got it.

12 MR. SHAFFER: Okay. So I was -- received a
13 written warning for production, which is also part of
14 Exhibit 4. You can see that on March 9th of 2009,
15 again, that's three months after my return from
16 disability leave, I was informed that I'm on a formal
17 warning for unsatisfactory production.

18 And if you look at Exhibit 4, Exhibit 4 is
19 a year-to-date -- excuse me -- and, you know, I was
20 subject to verbal warnings prior to my disability leave.
21 Exhibit 4 is a listing of market link CD and market link
22 note production for 2008 through October.

23 And you'll see -- if you look down this
24 list, there's three pages here. It lists every broker
25 in the Sacramento district's production in these types



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1 of investments offered by Wells Fargo. And you can see
2 my name is up there near the top. It's about, what is
3 it nine or ten from the top, I came into \$3 million in
4 generated commissions of \$58,000 for these market link
5 CDs and market link notes.

6 So I'm one of the top performing sales
7 people at \$3 million in sales, but, again, I'm going on
8 written warning and threat of termination.

9 Anyway, the problem is that although this
10 is good for the client because it gives them a principle
11 guarantee and the opportunity to participate in equity,
12 commodity, real estate and gold indices without an
13 upfront load or sales charge, market link CDs only
14 generate a one percent sales charge. So I generated
15 \$68,000 selling this Wells Fargo originated product --
16 I'm sorry, that's \$58,000. But that's at approximately
17 a one percent commission fee because the client doesn't
18 pay a commission and they get a principle guarantee.
19 Just think, if it would have been three percent, that
20 would have been a lot better for Wells Fargo's purposes.
21 For me, it didn't matter. Because these vehicles were
22 perfect for the clients in a period of extreme
23 volatility for the market but not good enough for Wells
24 Fargo because they generated lower commissions
25 initially, which is a violation of standard business



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1 practice and security regulations.

2 And the same situation exists with regard
3 to my sales of Wells Fargo Advantage Mutual Funds. I
4 have no performance records on those, but I'm sure
5 you'll show my sales performance were above average, but
6 many of the sales I made were C class shares resulting
7 in a one percent commission credit.

8 So even though I'm -- in fact in one
9 instance, which we can review in the future, I was put
10 under warning again in August of 2009. And in that
11 particular month, I had generated a million dollars in
12 sales in Wells Fargo mutual funds C shares.

13 And, in fact, if you go to the same --
14 generated a million dollars in Wells Fargo mutual funds
15 shares for the month. One sale was for \$500,000 for my
16 own client that I had brought to the firm. Those
17 purchases of C shares in the Wells Fargo mutual fund
18 group got no sales credit for the producing
19 representative.

20 So in other words, out of \$1 million, some
21 of it was subject to only a one percent fee. And
22 \$500,000 of it, I got no sales commission credit for. I
23 explained this situation to Mrs. Krug and she suggested
24 that I switch to another fund family which did not have
25 this policy, which I did not; because, one, I consider



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1 it unethical; and two, I couldn't find -- this was a
2 short-term municipal bond fund. And I couldn't find any
3 other fund that had a yield as good as the Wells Fargo
4 funds.

5 So here I am supporting Wells Fargo funds
6 not even getting credit for a half-million-dollar sale,
7 which would be considered a substantial sale, no sales
8 credit at all. And that was one case in August of 2009
9 when I was put on a, you know, termination notice.

10 But in this other case, and the one we're
11 looking at, there I am at \$3 million in sales in these
12 particular Wells Fargo issued securities, yet it's not
13 good enough. Because I was getting verbal warnings at
14 that point. And then the formal warning in March of
15 2009, which if we could go on from that point.

16 What I'm suggesting is that Wells Fargo
17 didn't have any consideration for the benefits of the
18 client and they really didn't care if I was bringing in
19 a million dollars to a Wells Fargo product, which is
20 more profitable to them than bringing it to an outside
21 product or Wells Fargo mutual funds. They don't care.
22 All they care about is the amount of revenue involved.
23 And they pressured not only brokers but people in the
24 banks unrelentlessly to generate revenue.

25 If we could continue on on this same idea,



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1 if you look at Exhibit 4 after that listing of market
2 link CD sales, you'll see that on March 9th of 2009, I
3 am on formal warning for unsatisfactory production
4 because I didn't reach 20,666, and you'll see there I
5 refused to sign. Because I asked Ms. Brandell at that
6 point, I said, "Well, if I'm fired, what about the
7 promissory note thing?" And she said, "Oh, well, you
8 would be responsible for that." And so I said, "Well,
9 that's crazy."

10 And again, I missed the February goal by
11 \$500, which we're going to review on the next page. So
12 at the beginning of March, I'm put on formal warning for
13 unsatisfactory production based on my February sales
14 numbers.

15 And if you look at Exhibit 4, the next one,
16 for February, I'm listed at number eight among all the
17 brokers. And this actually is only the branch-based
18 brokers at Wells Fargo. There were other brokers in the
19 hub that didn't need to have the new people, new
20 accounts and new money coming to them by being in a
21 branch, so they're not included in this listing.

22 It says right here at the top, "store-based
23 brokerage, 2009". And there I am at number eight. I
24 came in at \$20,159. Well, if you look at Ms. Brandell's
25 e-mail, because I didn't make it to \$20,666, so for the



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1 sum of \$500, I'm being terminated with -- I mean I'm
2 being threatened with termination, which as you can
3 imagine when your welfare -- the welfare of your family
4 is on the line, it can tend to make you a little cranky.

5 So then if you go to the next page on
6 Exhibit 4, you'll also see another listing. And this is
7 a store-based broker's total compensation through
8 February 28th. And there I am in 14. It says -- excuse
9 me. This is -- this is not total compensation. This is
10 a listing of commissions generated. There I am at
11 number 14 for the whole year of -- up to February 28th.

12 So what I don't understand is how you can
13 threaten someone who was number eight for the month and
14 number 14 for the year out of 29 people with termination
15 based on sales production when they sold \$3 million in a
16 product that only generated approximately a 1-percent
17 sales commission. It just shows that they don't care
18 about anything but revenue generation.

19 And it puts the broker in an incredibly
20 unconscionable situation where you have to sell the
21 higher-commission products to people, which to me is
22 just like a basic violation of the whole covenant of the
23 brokerage industry, trying to do what's best for people.

24 I have one more example of this type of
25 treatment and discrimination. And it's on -- it's on a



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1 page closer to the end. And at the top, it says "Wells
2 Fargo I bonus". If we could move on to that at this
3 point, at the bottom, this is one of the things that I
4 received from the Kane and Fischer package. It says
5 0009.

6 MR. KANE: Is that what we looked at,
7 Exhibit Number 4?

8 MR. SHAFFER: Yeah. Right near the end of
9 the booklet, if you go in maybe 20 pages. You'll see
10 something that says "Wells Fargo I bonus" on the top.

11 ARBITRATOR: It says 6/1/2009 at the
12 bottom, Bates W009 at the bottom.

13 CHAIRMAN: This is the medical stuff. It's
14 after the medical stuff.

15 MR. SHAFFER: Yeah. It's right near the
16 back of the -- if you take a chunk of paper a quarter of
17 an inch thick or eighth of an inch thick.

18 ARBITRATOR: We're just going to share.

19 MR. SHAFFER: Let's go ahead and take a
20 look at this. Now, this is after Ms. Brandell is
21 transferred to the Santa Rosa area and Ms. Jan Krug was
22 then my manager. This was an e-mail that, again, I got
23 from the information that came from the package that
24 Kane and Fischer sent me. It deals with a performance
25 warning situation.



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1 As you can read -- I don't know why it says
2 "Wells Fargo I bonus" at the top. It's almost like Jan
3 or these people are getting a bonus for terminating
4 employees. But these are coaching notes. That's a
5 little humor. I don't believe they would put in writing
6 that they got a bonus for terminating employees.

7 MR. KANE: I have to object to this.
8 There's nothing in here about his being terminated. He
9 wasn't terminated for lack of production. This is June
10 of 2009. He wasn't terminated for this.

11 CHAIRMAN: This refers to a written
12 performance warning. And I think that is a subject
13 which we are dealing with, namely his termination, and
14 whether it was wrongful or not.

15 MR. KANE: Well, the point is his
16 termination wasn't -- this is June of '09. He wasn't
17 terminated in June of '09 and he wasn't terminated for
18 lack of production, and his U5 doesn't indicate that he
19 was terminated for lack of production.

20 CHAIRMAN: And the U5 may not be the total
21 reason for his termination. I think he is permitted to
22 present evidence which surrounded his termination for
23 whatever reason he was terminated. Go ahead,
24 Mr. Shaffer.

25 MR. SHAFFER: Thank you, Mr. Reece. I feel



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1 that my termination was not based on these incidental
2 and accidental items. It was based on the constant
3 go-around and the bad relationship that was developed
4 from this.

5 Take a look at this. "Ken was put on
6 written performance warning on 3/9/09 for three months.
7 His minimum metric for revenue was set at \$20,666. Ken
8 exceeded this minimum each of the three months in the
9 period with an average of \$26,065. Careful monitoring
10 will continue to take place to help, and coaching Ken
11 and even exceeding this new minimum. Ken should set his
12 pace at \$30,000 a month to remain competitive in this
13 model as a WFI FC. Formal written warning status will
14 be discontinued as of June 30th of 2009."

15 What she's saying there is my sales goals
16 were raised from \$20,666 to \$30,000 a month, almost a
17 50-percent increase. I think this shows an intention to
18 terminate me for that reason. When she couldn't, out of
19 whatever motivation she might have, she decided to use
20 these other items as an excuse.

21 Now, the other point I'd like to make in
22 that regard, and this is a reflection on Ms. Krug, if
23 you look at the notes, the page just before that shows
24 some notes about a meeting that I had with Ms. Krug, I
25 guess, dated July 29th. And it says on 6/1/09, minimum



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1 set at \$30,000 a month. So again, there's verification
2 that my goal was raised from \$20,666 to \$30,000 a month.

3 And additionally I have another note from
4 Ms. Krug that you have to go back a few pages for. And
5 it's a handwritten page. It's dated 8/28/09. It says
6 "review of Ken Shaffer, review with Ken Shaffer". Can
7 you find that? It's about --

8 CHAIRMAN: Yes.

9 ARBITRATOR: Review of Ken Shaffer, 8/28.
10 It's several pages toward the front.

11 MR. SHAFFER: What you'll notice, I think
12 this gives us a good insight into the untenable
13 situation at Wells Fargo. It says "to date, \$10,500,
14 not showing \$20,000 revenue will hit." She goes down
15 and makes some more notes and says that, "My licensed
16 banker feels like" -- where does it say -- down at the
17 very bottom of the notes, you'll notice that Ms. -- this
18 is Ms. Krug's notes. It says "work his book by deciding
19 which clients deserve a deeper drill."

20 Now, I don't know if you folks have
21 experience with the brokerage industry, but again, which
22 clients deserve a deeper drill? This is one of the
23 reasons why my relationship with Ms. Krug became rocky.
24 I mean, statements like that.

25 And the other case where I was put on



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1 performance review and had done the
2 half-a-million-dollars mutual fund trade as part of my
3 million dollars in Wells Fargo Advantage Mutual Funds,
4 she explained it like this, if I could show you this:
5 She said, "So you thought you were going to get this
6 much, but you got this much."

7 And I'm sitting there in a performance
8 review being threatened with termination by people who
9 have motivations like this. I mean, it's crazy. I just
10 thought it was crazy. And, again, I did lose it to some
11 extent. You can see by my e-mails, I never threatened
12 anyone, although it crossed my mind. I remained civil
13 the whole time. And, again, it was just a repeated
14 process of craziness.

15 If you will please turn -- this is my last
16 page on this, the previous page to the one we just
17 looked at, handwritten notes, "performance review of Ken
18 Shaffer". Look down at the bottom. It says, "What
19 we'll book, \$198,000 in client's bank account plus
20 \$100,000 maturing market link CD. Reinvested in
21 short-term government fund approximately \$200 million.
22 \$6,500 if successful close."

23 All Wells Fargo cares about is the revenue.
24 They don't care what you have to do to get it. Because
25 if you do have a client complaint, they'll just fire



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1 you. There's -- it's undue pressure. It's just a
2 ridiculous situation. All she cares about is the
3 revenue that's generated. There's no concern with how
4 many new accounts I opened, how many market link CDs I
5 sold, how many millions of dollars went into Wells Fargo
6 Advantage Mutual Funds, again C shares which paid one
7 percent, which I think were a better deal for the
8 client.

9 In summarizing this whole situation,
10 please, just bear me with me one more second and I'd
11 like to turn to Exhibit 7 among the exhibits.

12 CHAIRMAN: Which is in what direction?

13 MR. SHAFFER: Exhibit 7 is almost in the
14 middle, a little bit closer to the beginning. It's
15 forward from where we were.

16 ARBITRATOR: What does it say at the bottom
17 of the page?

18 CHAIRMAN: Nothing. This is what it looks
19 like.

20 MR. SHAFFER: There's nothing on the
21 bottom. It's a page where a large portion of the names
22 are all darkened.

23 CHAIRMAN: That's four and there's five.

24 ARBITRATOR: I've got it.

25 MR. SHAFFER: Then if you'll notice, if



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1 you'll turn to the page before and see my little
2 commentary, what's wrong this a picture? This is a
3 listing of financial advisors from 2009. And some of
4 these might have been terminated. It's a listing of
5 financial advisors from 2008. The darkened names are
6 those financial advisors who are no longer with the
7 firm. 22 of the financial adviser, or 62 percent, have
8 either resigned or been terminated.

9 CHAIRMAN: As of when?

10 MR. SHAFFER: As of now, if you look back
11 at this list. Again, and this -- this list was in 2009.
12 So all the darkened people, and you'll notice my name
13 there, have either been terminated or resigned. And,
14 again, it makes you wonder what's going on with this
15 thing.

16 Like I said, also gone is Ms. Jan Krug,
17 less than 24 months with the firm. Perhaps she was
18 terminated for overterminating, perhaps because she has
19 a caustic personality, treated financial advisors in a
20 demeaning manner, or had what one currently-employed
21 sales assistant named Trudy Mitchell described as 14
22 broker complaints.

23 And maybe Ms. Mortensen could tell us more
24 about why Ms. Krug is not with the firm anymore. But I
25 think this provides an insight into the life and



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1 pressures of Wells Fargo employees. They treat their
2 employees as human capital, and the turnover rate at
3 both the brokers division and the bank demonstrate this.

4 So part of my theory here is that I was
5 terminated because I would not generate the -- I could
6 not generate with the branches I had the amount of
7 commissions that they were demanding from me. And they
8 had no consideration for what was best for the client or
9 what your sales levels were or what your new account
10 levels were. It was all about show me the money,
11 generate the revenue.

12 And, oh, by the way, you know, if you get a
13 client complaint, then you're going to be brought in
14 here and be grilled about it and then we just fire you.
15 You can see 60 percent of the brokers are gone.

16 CHAIRMAN: Anything else, Mr. Shaffer?

17 MR. SHAFFER: I pause for a while, not rest
18 my case, but certainly pause.

19 CHAIRMAN: Are you going to present further
20 evidence? Do you have any further testimony to give us?

21 MR. SHAFFER: As a matter of fact, I do.
22 Since we're on Exhibit 7, if you flip two pages back,
23 there's -- by the way, just go one page back, that's May
24 production levels. And I'm at number 15 out of 42 at
25 that point because -- that's Exhibit 8. Now, this



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1 included the HUD-based brokers as well. That's why
2 there's 42 brokers. I'm number 15 for production in
3 May, but then again, year-to-date, 28 out of 42.

4 And then if you turn to the next page, in
5 September, my production level was \$22,835. And, again,
6 part of what I think is going on here is that, you know,
7 she would have liked to have terminated me because of
8 the attitude that I thought I was being taken advantage
9 of and Wells Fargo clients were being taken advantage of
10 and for not meeting the production minimums. But she
11 couldn't do that, so she comes up with the other stuff.

12 And, again, maybe you can tell me, why is
13 Jan not with the firm anymore?

14 CHAIRMAN: So far as I know, Ms. Mortensen
15 has not yet been presented as a witness. You may call
16 her if you want to, or Mr. Kane may call her if he wants
17 to.

18 MR. SHAFFER: I -- one of my other items
19 was that I would like to present an e-mail from a
20 witness on my witness list. And it serves as kind of
21 a --

22 MR. KANE: Just so you know, I would have
23 an objection to that. If he has a person on his witness
24 list, he should call the witness and not present an
25 e-mail if I'm not going to be cross-examine the author



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1 of the e-mail.

2 ARBITRATOR: Would it be possible to call
3 her?

4 MR. SHAFFER: It's a him. It just refers
5 to a statement Mary made about Jan Krug, and I thought
6 it was pertinent. And it also gives you an indication
7 of the kind of environment that the financial advisors
8 were living in there.

9 CHAIRMAN: Mr. Kane, are you going to have
10 any witnesses by phone?

11 MR. KANE: I don't know yet. I'll know
12 better once Mr. Shaffer finishes his case. I suspect
13 not, but I don't know for sure.

14 CHAIRMAN: It is true that if you call a
15 witness, the other side should have the opportunity to
16 cross-examine them. And that's why we do sometimes --
17 well, more than sometimes, permit telephone testimony
18 even though we missed the body language which is
19 sometimes useful. But an e-mail doesn't really permit
20 that cross-examination.

21 MR. SHAFFER: Yeah. And that's the reason
22 I put this gentleman on my witness list because it would
23 certainly be possible to call them and verify that they
24 made this statement. It's basically just a statement
25 about a comment Mary made regarding Ms. Krug. I think



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1 it's pertinent to all the items being discussed.

2 CHAIRMAN: And you're not inclined to call
3 Mary as a witness; is that it?

4 MR. KANE: He didn't list her as a witness.

5 CHAIRMAN: Actually, we did not receive his
6 witness list, or I didn't.

7 MR. KANE: It was attached to the
8 counterclaim.

9 CHAIRMAN: Okay. So I'm afraid that we
10 can't submit that.

11 MR. SHAFFER: The other thing I would like
12 to raise, Mr. Reece, is if Mary is a witness, wouldn't
13 something that gave us an insight into her character or
14 motivation be within my rights?

15 CHAIRMAN: Who is "her"?

16 MR. SHAFFER: Ms. Mortensen.

17 ARBITRATOR: If she's called as a witness,
18 then you may cross-examine her.

19 MR. SHAFFER: Could I then present an
20 e-mail stating her --

21 ARBITRATOR: Is she on your witness list?

22 MR. SHAFFER: I meant the person who --

23 ARBITRATOR: Ms. Mortensen?

24 ARBITRATOR: No, but if she has been
25 brought here to be a witness and she is called as a



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1 witness by the claimant, then he has a right to
2 cross-examine her.

3 CHAIRMAN: And depending on what she says,
4 your e-mail may be admitted or may not be admitted. But
5 if it is admitted, it would be admitted as an
6 impeachment.

7 MR. SHAFFER: I just think that's a real
8 nice character reference. So we'll save that for later.
9 Can I go on to one other point you wanted to make?

10 CHAIRMAN: Before you do, I would like
11 to -- and I'm violating my own admonition not to
12 interrupt. You first took us to this Wells Fargo I
13 bonus note that Jan Krug is said to have created. Do
14 you want to look at that?

15 MR. SHAFFER: If I can find it.

16 ARBITRATOR: It says "009" at the bottom.

17 MR. SHAFFER: Well, let's assume I'm
18 looking at it.

19 CHAIRMAN: Well, the last sentence of this
20 I was wondering about. "Formal written warning status
21 will be discontinued as of June 1, 2009." Did you
22 receive any further formal written warning after June of
23 2009?

24 MR. SHAFFER: Yes, I did, both August and
25 September. And I have those e-mails somewhere.



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1 Remember, August was the month I was put on written
2 warning -- well, I was put on written warning at the end
3 of August for September, which was the reason I was
4 trying to make sure that I made their imposed minimums.

5 And the reason I was put in written warning
6 in August was for missing my sales goal that happened to
7 be the same month when I brought in a million dollars in
8 new money to the Wells Fargo mutual fund family.

9 Again, all of it -- it's C shares. And the
10 C shares in one fund, if the one fund was over \$500,000,
11 generate no commission at all. So half a million at one
12 percent, it's all money that goes to the firm and
13 benefits the firm. And there's an ongoing benefit, as
14 well. But they don't look at it that way. They look at
15 it as what have you done for me this month.

16 CHAIRMAN: Now, with regard to the sentence
17 that I read, which was the last sentence of this e-mail,
18 has anyone told you or have you learned from any source
19 what the meaning of that statement is or the reason for
20 it or the policy or practice with regard to formal
21 written warnings?

22 ARBITRATOR: The statement that no formal
23 warnings --

24 CHAIRMAN: Formal warnings will be
25 discontinued as of June 1, 2009, what does that mean?



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1 MR. SHAFFER: That's because I was on
2 formal written warning and I achieved the minimum levels
3 of commissions, again, I feel ethically, or else I won't
4 do it.

5 ARBITRATOR: So in your mind, this didn't
6 mean that you would not receive a written warning again?

7 MR. SHAFFER: No. It meant I was off
8 written warning at the time. Was that the one where she
9 said, "By the way, your minimums are \$30,000 a month
10 instead of \$20,000."

11 CHAIRMAN: Thank you. You wanted to go on
12 to another area. Where was that?

13 MR. SHAFFER: I did. Exhibit 11, which is
14 almost -- it's exactly in the middle. And at the
15 bottom, you'll see -- this is also something I received
16 from the Kane and Fischer package. You've got -- it
17 says "W0115" at the bottom, Exhibit Number 11. Have you
18 got that?

19 Well, again, now, this says "key business
20 objectives and target, feedbacks and coaching". And you
21 can see that one, if you go down to the lower part, it
22 says "compliance and trade errors, number two". Let's
23 start with the first part. I'm sorry. I'm jumping
24 around.

25 So under number two, "Complaints and Trade



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1 Errors", the first item, maintain a satisfactory client
2 rating of less than three sales practices, complaints
3 annually. So I had -- if you consider the complaint
4 that I don't think it's a true complaint and didn't
5 forward, if you consider that a complaint, that's one
6 complaint I had.

7 And if you look down below, it says
8 "ongoing year-end and dates complete". It says "number
9 one, no issues". So I had no issues with complaints or
10 trade errors at that point. And right here, it says
11 "Maintain a satisfactory complaint rating of less than
12 three sales practices complaints annually."

13 It's in their own employee manual and they
14 fired me for one, again, that I don't believe was a real
15 complaint or wasn't a verifiable complaint. So that's
16 still in line with the wrongful termination, I believe.

17 I also have another -- I feel the
18 situation, the other situation with the supposed
19 overcharging of my client, the Winnegers, I would refer
20 to as a trade error.

21 And I also have -- and I'd have to find it,
22 but trade errors are not a reason for termination. It
23 says that trade errors will come out of your payment
24 unless you, you know, ask for it to be reconsidered.
25 So, again, that's the end of my wrongful termination



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1 issues.

2 CHAIRMAN: Okay. Does that, then, cover
3 your cross-complaint?

4 MR. SHAFFER: Oh, I could explain some
5 more. No, I think --

6 CHAIRMAN: By my recollection, you have
7 covered promissory note, wrongful termination, the U5
8 withholding of disability benefits, and withholding of
9 commissions. In addition, promissory estoppel, the next
10 two items were not -- were not noticed and were not
11 permitted.

12 MR. SHAFFER: Then that would be it on
13 those items.

14 CHAIRMAN: So are you in a position to rest
15 your case? In other words, "I rest" meaning I have no
16 further evidence to produce.

17 MR. SHAFFER: If I wanted to talk about
18 damages in this situation --

19 CHAIRMAN: That would be part of your
20 closing. Well, wait a minute. You need to present
21 evidence of what damages you have suffered as a result
22 of these allegations, for example, the wrongful
23 termination would be an example, the promissory note
24 that is claimant -- and this is your response to that
25 claim. The U5 libel and slander claim, and I suppose



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1 you can talk about withholding commissions and
2 withholding disability benefits under the subject -- or
3 in the subject of damages.

4 MR. SHAFFER: I'd like to do that. And let
5 me find -- while I talk about damages, hold on a second.
6 Does anyone need to take a break, by chance?

7 CHAIRMAN: Yeah. Let's -- although we've
8 had a break, but if you would like one to find where you
9 want to go, that's certainly appropriate.

10 MR. SHAFFER: I'd like one.

11 CHAIRMAN: Okay. Let's take five minutes.
12 Off the record.

13 (Thereupon, a break was taken.)

14 CHAIRMAN: Okay. Mr. Shaffer, you were
15 going to present testimony regarding damages.

16 MR. SHAFFER: Please. And if this
17 information is my booklet, but the exhibit that I'll be
18 referring to is Number 9, and it's a Social Security
19 wage statement. I thought you might need that to verify
20 what my full wages were beyond the period that Mr. Chung
21 had --

22 ARBITRATOR: Why don't you wait until we
23 get to that page?

24 MR. SHAFFER: Exhibit 9 is a Social
25 Security wage statement. It shows my wages actually



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1 back to high school days. Those are exclusively and
2 only from my brokerage firm activities. As I mentioned,
3 I joined Drexel, Burnham, Lambert when I was 24. This
4 was the only career I've ever had. Referring to Exhibit
5 Number 9 --

6 ARBITRATOR: What year was that?

7 MR. SHAFFER: Those are for all years up to
8 2003. Hopefully it wasn't a whole year, because I only
9 made \$6,880. Then I jumped to 16 and 35. That was good
10 money in '83.

11 Throughout this whole period, I tried to do
12 the best thing for the client. And I always felt
13 disappointed if I got put in a situation where I wasn't
14 doing the best thing for the client.

15 But Mr. Chung had asked about my
16 productivity at previous firms. If you recall in their
17 discovery requests, he asked me how much I had made
18 under management at previous firms and so on.

19 And if you'll look at Exhibit 8, from my
20 employment at brokerage firms since 1979 without
21 interruption, you'll see my income, my five-year income
22 average up to the time I joined Wells Fargo was slightly
23 over \$93,000 a year. My earnings while I was at Wells
24 Fargo averaged \$78,000 a year.

25 And, you know, I just took the basic



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1 numbers and didn't take it beyond the first couple of
2 places. So all of these numbers are.

3 CHAIRMAN: Are you referring to a chart?

4 MR. SHAFFER: Yeah. It's just Social
5 Security wages in case you wanted to verify that.

6 MR. KANE: It only goes to 2003.

7 MR. SHAFFER: Mr. Chung had demanded that I
8 provide that information beyond that point, so that is
9 in my package that I provided from 2004 and 2005.

10 MR. KANE: I'm asking if there's a document
11 in here we should be looking at.

12 CHAIRMAN: Did you have a copy of that
13 which you provided Mr. Chung?

14 MR. SHAFFER: I may have.

15 CHAIRMAN: Because this only goes up to
16 2003 and I don't see any chart of average earnings.

17 MR. SHAFFER: Right.

18 CHAIRMAN: Although you've testified to
19 what that average is.

20 MR. SHAFFER: I have part of that
21 information that I provided to Mr. Chung about my
22 earlier earnings. Why don't I tell you what I earned
23 and we'll see if it matters.

24 ARBITRATOR: We're not seeing anything past
25 2003, so that's why we're asking.



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1 MR. SHAFFER: Like I said, I already
2 provided this -- I may have a copy of the information I
3 provided. But I provided all that to Kane and Fischer
4 as part of their demand that they were going to -- we
5 had the conference call regarding my cooperation with --

6 CHAIRMAN: Do you have it at home, or --

7 MR. KANE: It's not at --

8 MR. SHAFFER: My home is two hours away.

9 ARBITRATOR: Can your wife fax it to us,
10 please?

11 MR. SHAFFER: Can you check that out? I
12 provided the information to them.

13 MR. KANE: I'm not saying he didn't provide
14 the information. It's just not in my book.

15 MR. SHAFFER: I got certain years right
16 here. I've got my Wells Fargo W-2s here for 2007, '8
17 and '9.

18 CHAIRMAN: What are those numbers? If you
19 want, you can testify from that. Well, you testified
20 what the Wells Fargo earnings for '7, '8 and '9 were.

21 MR. SHAFFER: Do you want the exact
22 figures?

23 CHAIRMAN: Yes.

24 MR. SHAFFER: Okay. For 2009, \$67,074
25 Social Security wages 397 -- so 68 or 69. And for 2008



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1 was \$69,994 and 2007 was \$77,900.

2 CHAIRMAN: \$77,900.

3 MR. SHAFFER: Yeah. Some amount. But my
4 average earnings while I was at Wells Fargo was \$78,000
5 okay. My average earnings while at the Bank of America
6 brokerage division was in excess of \$140,000. That's
7 the information on the Social Security statement.

8 ARBITRATOR: What years were they?

9 MR. SHAFFER: That's why I also attached --

10 ARBITRATOR: Because that should be in this
11 record here.

12 MR. SHAFFER: Oh, wait. And here is my
13 response to Kane and Fischer --

14 ARBITRATOR: For example, in 1999, your
15 taxed Medicare earnings was \$222,000.

16 MR. SHAFFER: Right.

17 ARBITRATOR: And in '98, 159, and in '97,
18 97.

19 MR. SHAFFER: Right. That was my average
20 during the period I was at Bank of America. And I think
21 I attached a FINRA -- let me find it in the very back.
22 I have a FINRA record of my employment.

23 ARBITRATOR: Do you recall what years you
24 were at Bank of America?

25 MR. SHAFFER: Yeah. It was '90 -- in fact,



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1 I thought Mr. Kane had gone over that earlier. He had
2 the records.

3 ARBITRATOR: He did. But it's --

4 MR. SHAFFER: In fact, if I could find
5 those, it was in '92 to '99, I believe.

6 ARBITRATOR: You left in 2000.

7 MR. SHAFFER: I left in '99. I thought I
8 copied that FINRA record of my brokerage employers. But
9 wait a minute. Where is the information that Mr. Kane
10 presented this morning? Because it had a whole
11 timeline.

12 It's in the binder. Yeah. Let me look at
13 this real quick and I can tell you exactly where I was
14 and what dates. And, again, I already provided the
15 information about my income from 2004 based on the
16 questions that they had asked.

17 ARBITRATOR: Do you know what tab it was?

18 CHAIRMAN: I think he said it was Tab 1.

19 MR. KANE: Exhibit Tab 1 would be your U4.

20 MR. SHAFFER: Remember you were asking me
21 about my --

22 MR. KANE: With 132?

23 MR. SHAFFER: W132 at the end. I was at
24 Wells Fargo Investments -- excuse me -- Bank of America.

25 ARBITRATOR: From '93 to '99.



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1 MR. SHAFFER: Exactly, 1993 to 1999. And
2 my average income, see, that's all reflected in those
3 Social Security wages. My average income during that
4 period was \$142,000 a year.

5 So my average while I was at Bank of
6 America, which I know it doesn't make any difference,
7 I'm just setting the stage here, was in excess of
8 \$140,000. My ten-year average the last ten years is
9 \$91,000.

10 I have been effectively barred from the
11 brokerage business after 30 years of service by Wells
12 Fargo without a serious client complaint or ethical
13 issue. My lost income costs will be over \$910,000 over
14 the next ten years based on my previous ten-year
15 average, which had been affected by market turbulence
16 and my own health issues. If you consider the
17 additional cost of healthcare and other benefits, my
18 actual damages are over \$1 million.

19 Over the first several months of my
20 unemployment, I realized I would likely have to find
21 employment in another industry and have applied for
22 numerous positions utilizing the skills that I have. I
23 have not been able to procure even one interview for
24 consideration outside my field.

25 I have even been rejected by e-mail twice



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1 by US Bank when I applied for a branch manager, a bank
2 manager position, which at one point I would have said
3 "I'm not going to do that. I make twice as much as a
4 branch manager." But, again, when I'm barred from the
5 business I have experience in, I thought, "Well, I could
6 be a great bank manager. I've been selling financial
7 products for 30 years."

8 I got two rejections by e-mail for US Bank
9 branches in my own area where I live so my -- I think I
10 might have some connections in the community or
11 something. After 30 years in the financial services
12 business and over a decade of bank experience, I cannot
13 even get a face-to-face meeting.

14 I've opened an account on Monster, records
15 available on request. I've attached the records at the
16 end of this information, but it doesn't matter. And I
17 have been rejected by e-mail or never even heard back.
18 I think because of the high number of job seekers and my
19 age of 56, I'm excluded from consideration.

20 And for a long time, my resume said "I
21 would like to apply my 30 years of experience in the
22 brokerage business to this new and exciting
23 opportunity." And I realized, well, as soon as I say
24 30 years of experience, they know they're dealing with a
25 50-year old. Maybe that's why I never get called back.



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1 Also affecting my job search are laboring
2 respiratory problems that cause me to cough and clear my
3 throat. Today has been an excellent day. I hope that
4 it continues.

5 If that throat condition was considered a
6 disability from the brokerage business -- and, again, I
7 don't think you have to have a total disability in the
8 brokerage business to be out of business, because
9 whereas a \$300,000 or \$400,000 producer has a job, a
10 \$200,000 producer doesn't have a job in this market
11 anymore.

12 So if something affects your productivity
13 by 50 percent, I think you're out of business. So if
14 you consider my respiratory problems a long-term
15 disability, the coverage for the program available
16 outlined in Exhibit 8, the short-term and long-term
17 disability would have had a value of \$1.2 million.

18 Many of the infractions of California labor
19 law which Wells Fargo has committed call for treble
20 damage considerations and an award. This application
21 would suggest that a damage award of approximately
22 \$3 million would be appropriate. I know my damages I
23 had listed at \$1 million and paid the fee. Basically,
24 that's all I could afford at the time. But that was a
25 suitable amount of damages.



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1 At this point, though, I've got a lot more
2 information and better information. And it turns out
3 that I am effectively barred from the brokerage
4 business, especially in the capacity I was employed at.
5 And so if you take that \$91,000 10-year average and
6 consider it over the next ten years, that's \$900,000 in
7 benefits, not including healthcare benefits or other
8 benefits.

9 So I would think that the application that
10 calls treble damages as many of these infractions would
11 suggest an award damage of approximately \$3 million.
12 There are also issues which have caused me pain and
13 suffering as well my family for which there can be no
14 financial recovery. And if I had a million dollars, I
15 would gladly pay it not to see my wife go through this
16 now for the last year.

17 And, again, especially in as much as
18 California employment law prohibits demanding amounts
19 from a promissory note upon termination, I just don't
20 understand why Kane and Fischer, Mr. Kane and Mr. Chung
21 are pushing this whole issue. And I'd also like to make
22 a note that my complaint is a counter-complaint.

23 CHAIRMAN: Any other testimony,
24 Mr. Shaffer?

25 MR. SHAFFER: Well, I have some other



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1 stuff. Again, you know, you tell me if you've heard
2 enough.

3 The other thing I'd like to draw your
4 attention to regarding my health situation is extensive
5 medical notes. In fact, on the conference call, one of
6 the ladies suggested I get my medical records and I did,
7 indeed. And I copied most of them.

8 I didn't copy the ones about my cholesterol
9 readings or something I had removed from my eye. But
10 you can review those notes on repeated visits I had to
11 the doctor, and basically, I have had a respiratory
12 problem which has affected my productivity, although
13 again, I think it's pretty good in light of all the
14 variables involved.

15 And again, they made absolutely no type of
16 adjustment or any kind of consideration for that fact.
17 And the Americans with Disabilities Act does suggest
18 that your employer should make some kind of concession
19 or adjustment for a health problem.

20 MR. KANE: I've tried not to object, but he
21 has not raised any of this in his counterclaim,
22 Americans with Disabilities Act, any of that. I've been
23 trying not to object, but I have to object. If it's not
24 in the counterclaim, I'm not able to defend against it,
25 and I object to eliciting testimony.



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1 CHAIRMAN: Are you talking about the ADA?

2 MR. KANE: That's right. It's not in
3 there. And if he tried raise such a claim, we didn't
4 consent to it. In the FINRA code, in our response, Rule
5 13201 in the FINRA code says, "A claim of any type of
6 discrimination is not required to be arbitrated under
7 the code, only if the parties have agreed to arbitrate
8 it." We simply don't agree to arbitrate that, so it's
9 not before the panel.

10 CHAIRMAN: That's sustained as to the ADA.

11 MR. SHAFFER: I understand. I do have one
12 other issue that's part of what I think we're talking
13 about here --

14 CHAIRMAN: Go ahead.

15 MR. SHAFFER: -- regarding what a previous
16 employer can tell a new employer. Is that something
17 that we can discuss? I have reason to believe that
18 Ms. Mortensen made derogatory comments to someone I was
19 interviewing with for another bank position.

20 CHAIRMAN: You can give testimony to what
21 you've said or what has been said to you.

22 MR. SHAFFER: Okay. Please let me do that.

23 MR. KANE: I'm going to object. His only
24 libel and defamation claim relates to the U5. We asked
25 him to state the basis, any other basis. This is the



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1 first time I've heard of that, and I don't think he
2 should be allowed to do it.

3 CHAIRMAN: You're proposing to state
4 something that was said to a potential employer by you
5 think Ms. Mortensen?

6 MR. SHAFFER: Right. Which is employment
7 law or regulation -- is called A1050. I don't know what
8 she said.

9 MR. KANE: My position is, one, that he's
10 adding to his defamation claim now and that he's doing
11 it during the day of the hearing. That's not
12 appropriate. That's number one.

13 Number two, we asked in discovery for
14 everything that related to his claims of defamation and
15 slander. It's not in any of his answers to discovery.

16 MR. SHAFFER: I was not aware of it.

17 MR. KANE: So I'm being blindsided at the
18 last second.

19 Third, it's apparently someone who I don't
20 know who is not here, so I'm not going to have the
21 ability to cross-examine about what was said to him.
22 And that's not just hearsay, because I know the formal
23 rules of hearsay don't apply. I'm not going to have an
24 opportunity to cross-examine the person.

25 He didn't identify it in discovery. He



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1 didn't identify the person in his 20-day exchange. And
2 for all of these reasons, we've given -- I have given
3 him a lot of latitude and this is going too far.

4 CHAIRMAN: Yeah. And I think it was
5 demonstrated during this conference call that anything
6 that was not provided to the other side could very well
7 not be admitted in evidence. And I think this does fall
8 into that category. So the objection is sustained.

9 MR. SHAFFER: The other thing I'd like to
10 bring up if I could is I received a lawsuit -- a
11 settlement of a lawsuit against Wells Fargo for
12 underpayment.

13 CHAIRMAN: That's irrelevant.

14 MR. KANE: I'm going to object to that as
15 well.

16 MR. SHAFFER: Which I did not respond to
17 because of this issue. I didn't want to sign off my
18 rights on something.

19 CHAIRMAN: I'm sorry. You received what?

20 MR. SHAFFER: Settlement of a lawsuit
21 against Wells Fargo.

22 CHAIRMAN: And you were invited to be a
23 participant?

24 MR. SHAFFER: I am a participant.

25 CHAIRMAN: You are?



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1 MR. SHAFFER: But it's this whole thing
2 that goes around the brokerage business about not
3 getting breaks or lunch breaks or rest breaks.

4 MR. KANE: None of that has anything to do
5 with this.

6 MR. SHAFFER: I wanted to say I did not
7 participate in that because I did not want to release
8 Wells Fargo from liability.

9 CHAIRMAN: Now, I notice that you have
10 introduced a number of pages of labor law, or submitted.

11 MR. KANE: I object to those as well.
12 Because, again, he hasn't listed those. That wasn't
13 part of his counterclaim.

14 MR. SHAFFER: Yes, I did. I listed the
15 provisions. These are all --

16 MR. KANE: I'm looking at the counterclaim,
17 Mr. Chairman. And perhaps I could be --

18 MR. SHAFFER: I listed the California --
19 remember, we talked about that on the conference call.
20 You suggested that I list the items of California labor
21 law that I wanted to bring up, and I did.

22 And how in the world could anyone argue
23 against bringing up California labor law in a labor-type
24 situation? That's just basic, isn't it?

25 MR. KANE: You have to plead what you're



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1 claiming was violated and that wasn't in his answer and
2 wasn't in his counterclaim.

3 CHAIRMAN: I'm going to overrule the
4 objection, because he did refer to labor laws, and he
5 has in his testimony. And I think it's fairly common
6 when an attorney, or he's pro se, when a law violation
7 is being proposed as part of a position, that copies of
8 that law be provided to the panel. And I take that to
9 be what he is doing.

10 MR. KANE: Understood.

11 MR. SHAFFER: Thank you.

12 CHAIRMAN: So Mr. Shaffer, I guess back to
13 my previous question, do you have any further testimony?
14 You provided damages. You've provided the several
15 subject issues that you identified with the exception of
16 two, which were not permitted. Anything else, sir?

17 MR. SHAFFER: Do you think it's appropriate
18 that I should suggest something which I view as the
19 firm's example of overcharging. And the reason why we
20 bring that up is your earlier comment that items
21 discussed here could possibly initiate a referral for
22 violation.

23 Would you like me to talk about something
24 that I think Wells Fargo does that's illegal.

25 MR. KANE: Mr. Chairman, that's not what



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1 the purpose of this arbitration is about.

2 CHAIRMAN: Right. We're here to consider
3 the claim of Wells Fargo which principally is the
4 promissory note and the terms within. And your
5 counterclaim for wrongful termination, U5 and the other
6 several other issues. We're not here to discuss
7 policies of Wells Fargo as they relate to items not
8 included in the claim or counterclaim.

9 MR. SHAFFER: But the only other problem I
10 have on that is would you like me to suggest a reason
11 why I was given the payroll document that showed my
12 promissory note as pay rather than a loan?

13 CHAIRMAN: If you have testimony that is --
14 that goes to the character of the documents that you
15 signed.

16 MR. SHAFFER: No. This is just -- I think
17 the reason they listed it as pay is because then they
18 can fraudulently deduct it as a taxable event for them.

19 CHAIRMAN: You have pointed out the word
20 "pay", and also it has been pointed out that that's been
21 characterized as a note and a loan and not a payment or
22 a bonus. I think the panel understands that those
23 phrases and words have been introduced in connection
24 with those documents.

25 MR. SHAFFER: And if it matters, the loan



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1 amount, supposed loan amount has been categorized as pay
2 in Wells Fargo's own documents.

3 CHAIRMAN: That you can argue.

4 MR. SHAFFER: You're aware of that. It has
5 and, again, if you want to bring that up or --

6 CHAIRMAN: You've testified to that. And
7 you can argue it when we do the argument, which we'll be
8 doing tomorrow, not incidentally, I think.

9 MR. KANE: I think so.

10 CHAIRMAN: So anything else, Mr. Shaffer,
11 that you want to offer in evidence? And, again,
12 understand that is not argument.

13 MR. SHAFFER: Pertaining to the subject
14 matter; right? No, I think that about does it.

15 CHAIRMAN: And by that, do I interpret you
16 to rest, which is a magic legal term.

17 MR. SHAFFER: I do.

18 CHAIRMAN: Now, Mr. Shaffer -- or rather
19 Mr. Kane wanted to introduce -- or has the opportunity
20 to present evidence that would be contrary to your
21 counterclaim.

22 MR. KANE: And I guess before I do that, at
23 this point in time, under the FINRA -- the new FINRA
24 rules, 13504 regarding motions to dismiss, this is the
25 only time that we have an opportunity to present such a



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1 motion to dismiss.

2 And I would like to do that at this time on
3 the basis that all of the things that Mr. Shaffer has
4 presented do not either factually or legally present the
5 claims for wrongful termination, for withholding of
6 commissions or libel, slander and the promissory note as
7 a bonus. And the legal argument is --

8 CHAIRMAN: Let me clarify. You are making
9 a motion to dismiss certain issues?

10 MR. KANE: All of his counterclaim. His
11 entire counterclaim. His first basis was that the
12 promissory note was a bonus. And then his argument
13 under the California labor code regarding the lump-sum
14 payments, which he misstated.

15 Clearly, he accepted the terms of this
16 loan, where it is indicated that it was a promissory
17 note. That's established in our Exhibit Number 5. But
18 even more importantly, prior to that time, he signed two
19 offer letters where it indicated that what he was going
20 to receive was not a bonus, it was going to be a loan.
21 And clearly, it was -- is stated in there.

22 In addition, despite all of the things that
23 Mr. Shaffer has indicated, the California Labor Code
24 under Section 1625, basis for contract law is simply
25 undeniable, that the execution of a contract in writing,



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1 whether the law requires it to be written or not,
2 supercedes all negotiations or stipulations concerning
3 that matter.

4 That pertains to his argument, very -- not
5 very strongly argued that somehow misrepresentations
6 were made to him ahead of time regarding the I guess
7 \$15 million in assets.

8 Also we saw in the offer letters that he
9 received, he specifically acknowledged in two that he
10 signed that no representations had been made to him
11 about books of business, assets, et cetera. He clearly
12 signed those two offer letters. And that was repeated
13 again in the promissory note that he signed, which
14 indicated that he was not relying on any oral
15 representations, or more importantly, under California
16 law. And we cite this at page 6, the note that he
17 signed.

18 CHAIRMAN: Page 6?

19 MR. KANE: Page 6 of the response to
20 counterclaim.

21 CHAIRMAN: Go ahead.

22 MR. KANE: At the bottom, that under
23 California law, and we specified the Shamlin case,
24 parties may contract for anything that is not illegal or
25 against public policy. And that's clear.



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1 And we cited California law at page 7 that
2 indicates that parties should adhere to the terms of
3 their contract. When a person with the capacity of
4 reading and understanding an instrument signs it, he's,
5 in the absence of fraud and imposition, bound by its
6 contents and is estopped from saying the provisions are
7 contrary to his or her intention.

8 So as it relates to the arguments under
9 promissory note, we believe that it's clear that nothing
10 is misrepresented about the terms of these loans. More
11 importantly, as indicated in California law, there is
12 very specific requirements to meet what would be, if he
13 was fraudulently induced to join these. And we set
14 forth the elements at page 8, that some false
15 misrepresentation was made, none of the falsity,
16 reliance and resulting damage.

17 Clearly, he can't say he had any
18 justifiable reliance on any of this was because he was
19 told that it was going to be a loan, not a bonus. He
20 was told that he was not relying on any promises,
21 whatever.

22 Moreover, he accepted the loan after
23 18 months after he already joined the firm. The loan --
24 he started in '06 and received the loan in January of
25 '08. So that's long after these supposed



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1 representations were made.

2 As it relates to the wrongful termination
3 claim, very clearly spelled out in the documents as to
4 the reason that he was terminated and the documents
5 clearly show that it was only after a flag came where he
6 was indicated as having charged excess commissions over
7 the schedule.

8 This is in Exhibit 10, that he was called
9 on the carpet for it, to explain this. And the
10 explanation that he gives is one that should cause the
11 hair on the neck of any compliance officer to raise. "I
12 thought gouging was part of our business plan."

13 If you, as a compliance officer, see that
14 the person has charged excessive commissions and then
15 get an e-mail explanation that says "I thought gouging
16 was part of our business plan". Contemporaneous with
17 this Exhibit 9, which is clearly a complaint, "My
18 attorney will contact you next, I'm pissed you got me
19 into this", if that's not a grievance of a person, I
20 don't know what more a customer could say. He admits
21 that he didn't report that. He admits that he knew what
22 the compliance manual said about his reporting that.
23 And it's those two items that certainly were appropriate
24 for dismissal.

25 But keep in mind, he was an at-will



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1 employee. He could be dismissed for any reason. He
2 could be dismissed for low production. He could be
3 dismissed for any reason whatsoever. But, clearly,
4 there was an appropriate basis under which he was, in
5 fact, terminated. So clearly, there's nothing wrongful
6 about this termination.

7 As it relates to the defamation, under
8 California law, U5s are absolutely privileged. We set
9 that forth at page 15 of our response to counterclaim.
10 California law extends an absolute privilege against
11 defamation claims arising out of statements contained in
12 a Form 5, because a Form 5 is a communication made in
13 anticipation of the bringing of an action or other
14 official proceeding.

15 And it's Fontani versus Wells Fargo that
16 says U5s are protected from liability under the
17 California Civil Code Section 47C. We placed that in
18 our document response to the counterclaim. I just want
19 to make sure.

20 CHAIRMAN: What exhibit is that again?

21 MR. KANE: It would be page -- it's not an
22 exhibit, but it's pages 15 and 16 of our response to the
23 counterclaim, the Fontani versus Wells Fargo case. It's
24 a 2004 case.

25 MR. SHAFFER: Can we have a quick point of



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1 of clarification?

2 ARBITRATOR: A question?

3 CHAIRMAN: Because you're going to be able
4 to argue against his motion.

5 MR. KANE: As it relates to the claim of I
6 guess it's the withholding of commissions, under his own
7 testimony, what he's referring to is if there's a
8 licensed banker who had a Series 7 license that referred
9 him business, so he's not the originator of the
10 business.

11 It's a licensed banker referring him
12 business. But for the licensed banker, he wouldn't get
13 that business, that he had to split the commissions with
14 that licensed banker 50/50 I think he said for one year.
15 There's nothing wrong, there's nothing illegal about
16 that. There's no legal basis. It's done all the time.

17 As it relates to his claim of damages, as
18 we indicated, damages can't be based on speculation.
19 For him to compare his earnings, what he did in 1992 to
20 1999 and say therefore I've been damaged because my
21 average was whatever it was, it is not an appropriate
22 measure of damages. Market conditions, everything
23 factors into that, and this is not the appropriate way
24 to prove damages.

25 More importantly, damages never come into



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1 play here unless Wells Fargo did something wrong. We
2 don't even get to the issue of damages unless Wells
3 Fargo did something wrong. What I've indicated here
4 based on his claim, Wells Fargo did nothing wrong. It
5 did not wrongfully terminate him. It did not withhold
6 commissions. It did not wrongfully describe this
7 promissory note as a bonus plan. And it did not libel
8 or slander him on the U5.

9 Not only is the U5 privileged, the
10 statements that are contained there are completely
11 accurate. The documents show that they were completely
12 accurate. That happened.

13 He admitted that he adjusted the
14 commissions upward and that they should have been a
15 lower amount. He admitted he did not report that
16 customer complaint. He says it's not a complaint. But
17 he did not report it to his supervisor as required. So
18 the statements that are contained on the 5 are
19 completely accurate.

20 His counterclaim must be dismissed. Wells
21 Fargo shouldn't be placed to the burden of presenting
22 any evidence against charges that are not supported
23 factually or legally. The counterclaim should be
24 dismissed now. Wells Fargo should present its
25 attorney's fees and ask for an award on the promissory



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1 note at the conclusion of the hearing.

2 CHAIRMAN: Okay. Mr. Shaffer, you can
3 argue against the motion to dismiss your counterclaim.

4 MR. SHAFFER: Well, I have several reasons
5 to be observed about those statements. The first one is
6 that, you know, that the counterclaim evidence that
7 Mr. Kane was reading was from Mr. Chung. That's
8 Mr. Chung's work. I'm wondering if that's even
9 applicable since Mr. Chung is not here.

10 CHAIRMAN: It's appropriate.

11 MR. SHAFFER: Okay. Well, the thing is
12 Mr. Kane suggested that I had misquoted the code that
13 says that you cannot demand repayment of a promissory
14 note when you terminate the employee. And I did not
15 misquote it. And it's in my presentation material. I
16 can find it if you'd like. But we've already gone over
17 that. But I quoted it exactly as stated.

18 It simply says that you cannot demand
19 repayment of a promissory note if you terminate the
20 employee even if they have already signed an agreement
21 agreeing to that.

22 CHAIRMAN: And you were referring to what?

23 MR. SHAFFER: I'm referring to his argument
24 that --

25 CHAIRMAN: Are you referring to California



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1 law?

2 MR. SHAFFER: Yeah.

3 CHAIRMAN: And where is that?

4 MR. SHAFFER: Let me find it, because it's
5 here. The other thing is Mr. Kane referred to me as an
6 at-will employee that can be fired for any reason. And,
7 also, the employment code shows that once I had entered
8 that contract of adhesion as it's defined, that I no
9 longer was an at-will employee. I ceased to be an
10 at-will employee at that point. And he mentions that.

11 CHAIRMAN: And where do you get that
12 argument?

13 MR. SHAFFER: That is --

14 CHAIRMAN: What's the basis for that
15 argument?

16 MR. SHAFFER: The basis is in my original
17 presentation material.

18 ARBITRATOR: It's on the first page of the
19 issues, I think.

20 CHAIRMAN: Under "Promissory Note".

21 MR. SHAFFER: Yeah, that would be in the
22 promissory note. And, again, let's review the -- was it
23 Section 11.2.5, real quickly, as far as misquoting that.
24 And these are -- I tried to put these in order of the
25 numbers.



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1 ARBITRATOR: The third paragraph under
2 "Issues, Promissory Note", is where he quoted the
3 adhesion.

4 CHAIRMAN: But did you provide a copy of
5 that law?

6 MR. SHAFFER: Yes, I did. And it's Section
7 11.2. Darn it. When you flip through the copies of the
8 statutes or whatever you would refer to them to, it's
9 Number 11.2.5. And it's within that section -- the one
10 after it has a June 2002 --

11 ARBITRATOR: Division of Labor Standards
12 Enforcement.

13 CHAIRMAN: I didn't see 11.2.

14 ARBITRATOR: I didn't see that, either. I
15 see the section.

16 MR. SHAFFER: I can show you mine if you'd
17 like to. It's -- let's see. The one before it is -- it
18 says it's 32.2.4. And the one after it is 26.

19 ARBITRATOR: 11.2.5?

20 MR. SHAFFER: Yeah, that's, what, probably
21 ten pages total there?

22 ARBITRATOR: Yeah, I see it.

23 MR. SHAFFER: Okay.

24 CHAIRMAN: Okay. Go ahead.

25 MR. SHAFFER: It simply says "I don't



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1 understand why Mr. Kane would say I misquoted it." It
2 says the court -- the deductions made by the employer
3 with the written consent of an employer made for loans
4 by the employer. But balloon payments made at the time
5 of termination are not allowed even if the employee has
6 given his or her consent to such payments. It's right
7 there. That's when I should have asked for a dismissal
8 of the promissory note demand.

9 The other thing on the previous page --
10 excuse me, it's two pages earlier, and it -- more than
11 that. Again, if you read Section 2.5.5, bonus defined,
12 you'll see that that promissory amount or loan amount,
13 supposedly, does qualify as a bonus.

14 And then on the page before that, 35.4, the
15 promise of a bonus becomes a unilateral contract. It
16 says a specific bonus plan normally becomes binding as a
17 unilateral contract when the employee begins
18 performance, which in my case was obtaining the minimum
19 sales level in a sense that the plan then cannot be
20 revoked by the employer.

21 So my legal slant on this is that when I
22 signed the promissory note agreement, I was no longer an
23 at-will employee. And even as an at-will employee,
24 there still is the assumption of justifiable cause of
25 termination.



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1 And in Wells Fargo's own manual states,
2 which we reviewed earlier, that you can have three
3 sales -- or you should strive to have no more than three
4 complaints per year. And, again, I was terminated at
5 the very first one.

6 Again, because I complained about what I
7 think is just -- if you look at the demographics of
8 Wells Fargo, it amounts to elder abuse, if you look at
9 the age of the folks involved with the investment
10 division, particularly.

11 Mr. Kane's statement about the licensed
12 banker, that that was a usually situation, I'm not aware
13 of any other of the brokerage program that deletes half
14 the commission because it's referred.

15 And when Mr. Kane suggested the licensed
16 banker was going to bring business to the financial
17 consultant, the broker, he was going to earn those
18 commissions. Remember, they didn't bring the business
19 in. They brought the people into the door or there was
20 a call session or something where they found somebody
21 that was willing to come into the branch.

22 All they did was find the people. They
23 didn't recommend the investment. Their licenses weren't
24 at stake if the investment plan should go wrong and
25 result in a complaint. They had nothing of the like.



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1 All they did was bring the people in the door. This was
2 really just a kind of clever idea to divert more money
3 away from the brokers and back to the bank. It
4 disappeared completely for some reason.

5 There was no usual situation with a
6 50 percent discount, and then being subject to revenue
7 requirements without concern for the client's well-being
8 or concern for the amount of clients or amount of
9 products sold. And I would just move that that is not
10 an item that should be dismissed.

11 MR. KANE: Okay. Just a very brief reply,
12 because I think it's important: What I argued on his
13 11.5 argument, as you'll see, it goes on to 11.2.6.
14 This is just a head note out of the labor code. He
15 doesn't put the whole case in context.

16 But, clearly, what it says, if you read
17 what it says, it doesn't apply to this situation. It
18 says in Barnhill the Court concluded that deductions may
19 be made by the employer with the written consent of the
20 employee for payment on loans made by the employer to
21 the employee. But balloon payments made at the time of
22 termination are not allowed even if the employee has
23 given his or her consent. They're talking about
24 withholding of wages at the time.

25 That's not what we're talking about here.



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1 That's made clear if you go to the next headnote where
2 it says "Conclusion reached by the Barnhill court
3 allowing deductions from wages of employees to repay
4 loans made by the employer to the employee is open to
5 question in view of the labor code."

6 That statute provides that no assignment of
7 future wages may be made unless wages have already been
8 earned, except as an accommodation, does not impose an
9 undue hardship. So they're talking about -- it's an
10 apples and oranges comparison. That's not what we have
11 here.

12 As it relates to the 35.4, we're not
13 talking about a bonus here where it says, "The
14 California courts have adopted a view that a specific
15 bonus plan normally becomes binding as a unilateral
16 contract when the employee begins performance in the
17 sense that the plan becomes revoked by the employer."

18 This isn't a bonus plan here. This is a
19 loan that was made to him. He acknowledges that he
20 didn't take -- he didn't treat it as a bonus. He didn't
21 deduct taxes. There was clearly a benefit. He got
22 \$111,000 to use as he felt he had to use it. He had the
23 use of that money to do whatever he wanted to do with
24 that money tax-free until the forgiveness benefit. Then
25 he had the benefit of spreading out the taxes over five



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1 years.

2 Clearly, that's not something that is an
3 adhesion contract or unconscionable. He had the choice
4 and he wanted -- he accepted the money. This wasn't
5 something that was forced on him.

6 And he accepted it, knowing what the terms
7 were before he even became employed. He knew that it
8 was going to be a loan, not a bonus. And he knew if he
9 left for any reason, he'd have to repay any unpaid
10 balance. He knew it before he joined. He knew it
11 18 months later when he accepted the loan.

12 I know he's trying to be a lawyer here, but
13 he's not understanding the law. And the law is pretty
14 clear on the contract that he entered into. And it
15 should be enforced in these counterclaims. It should be
16 dismissed. Wells Fargo shouldn't have to spend any more
17 money defending these frivolous counterclaims.

18 UNIDENTIFIED SPEAKER: Off the record.

19 (A discussion was held off the record.)

20 CHAIRMAN: As you've seen, the panel has
21 conferred and the panel denies the motion to dismiss the
22 counterclaim.

23 We're going to recess now to enable you all
24 to prepare for tomorrow and to prepare your closing
25 arguments if we get to that, which I think we will. And



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1 therefore, to my colleagues, I suggest that we plan to
2 be here all day, some of which may be conferring as to
3 what our award, eventual award is.

4 ARBITRATOR: Unless you're putting on
5 witnesses tomorrow. Are you planning on bringing
6 witnesses tomorrow?

7 MR. KANE: Yes. Strictly as it relates to
8 the counterclaim. I won't go over the notes. I'm going
9 to call Mr. Shaffer. He will be the first witness.
10 Then I'll call Ms. Mortensen and/or Mrs. Brandell, not
11 even in that order.

12 CHAIRMAN: So we may not even complete
13 tomorrow, just to give you all some logistic planning.

14 MR. KANE: I hope to complete. I may not
15 need Ms. Brandell. I'm going to make a decision on
16 that.

17 CHAIRMAN: That's fine. And it's clearly
18 your decision.

19 ARBITRATOR: And we also have Thursday
20 planned, too. So we're not under the gun on this at
21 all. We want to give you the fair chance for both of
22 you to put on your case.

23 CHAIRMAN: Okay. So we'll stand in
24 retirement -- or what is the word I'm fishing for?

25 ARBITRATOR: Recess.



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